

New FairPlay Rules Governing Overtime Launched on August 23rd.

Department of Labor answers 15 of the most pressing questions.

1) Question: Are blue collar workers protected from losing overtime pay?

Answer: Yes. For the first time, blue collar workers' overtime is guaranteed in the rule.

For the first time in the history of the Fair Labor Standards Act, the "white collar" exemptions explicitly spell out that "blue collar" workers are not subject to the overtime exemptions. New § 541.3(a) of the Department's final rules guarantees the overtime rights of "blue collar" workers – including carpenters, electricians, mechanics, plumbers, iron workers, craftsmen, operating engineers, longshoremen, construction workers, laborers and non-management production-line employees. New § 541.4 also explicitly protects the rights of union members who receive overtime pay pursuant to collective bargaining agreements.

2) Question: Are first responders sufficiently protected?

Answer: Yes. The overtime rights of first responders are explicitly guaranteed.

For the first time ever, the Department's final rules describe the various duties performed by police, fire fighters and other first responders to ensure that workers performing such duties are entitled to overtime. The silence of the existing regulations regarding this vital group of workers has resulted in significant litigation. These Americans' pay rights have been further damaged by false information spread about the Department's rules – such as the distortion that police sergeants will lose overtime protection. To protect police and other first responders from such harmful misrepresentations, the preamble to the final rule, 69 Fed. Reg. at 22129, clarifies that police sergeants "are entitled to overtime pay even if they direct the work of other police officers because their primary duty is not management or directly related to management or general business operations; neither do they work in a field of science or learning where a specialized academic degree is a standard prerequisite for employment." Relying on existing case law, the Department included §541.3(b) in the final regulations to clarify that police, fire fighters, paramedics, EMTs, and other first responders are non-exempt and fully entitled to overtime.

3) Question: What are the rights of Registered Nurses?

Answer: There is no change from current law on the overtime protections for RNs.

The final rules make no change to current law regarding overtime protection for RNs. RNs paid on an hourly basis are entitled to overtime pay under the final rules. RNs who receive overtime pursuant to a collective bargaining agreement are expressly protected under the final rules. In general, RNs have been viewed as performing the duties of an exempt learned professional *since 1971* – a position reflected in the old rule § 541.301(e)(1). New § 541.301(e)(2) reiterates the longstanding view that RNs satisfy the duties test for learned professional employees while licensed practical nurses and other similar health workers generally do not, regardless of work experience and training – because possession of a specialized advanced academic degree is not a standard prerequisite for entry into such occupations.

4) Question: Are union members' overtime rights protected under the new regulations?

Answer: Yes. Union members' overtime rights are explicitly protected and may be strengthened by the final rule. For the first time ever, the final Part 541 rules explicitly protect union members covered by collective bargaining agreements. Final § 541.4 states that "nothing in the Act or the regulations in this part relieves employers from their contractual obligations under collective bargaining agreements." Moreover, since the final rules guarantee overtime protection for more workers, and since the final rules also explicitly recognize overtime rights for police, fire fighters, other first responders and licensed practical nurses, union members who work under collective bargaining agreements that incorporate FLSA eligibility by reference also stand to benefit.

5) Question: Are inside sales employees entitled to overtime?

Answer: Yes. Overtime protections are strengthened for inside sales workers.

The final rules strengthen overtime rights for inside sales employees. First, in the final rule's preamble, the Department expressly states that it "does not have statutory authority to exempt inside sales employees from the FLSA minimum wage and overtime requirements under the outside sales exemption." 69 Fed. Reg. at 22162. Second, under the administrative exemption, the final rules include an example protecting the overtime rights of inside sales employees: "[A]n employee whose primary duty is selling financial products does not qualify for the administrative exemption." § 541.203(b).

6) Question: Do the requirements for outside sales employees remain the same?

Answer: Yes. Overtime protections for outside sales employees remain the same. The 20-percent time test in the old outside sales exemption was extremely difficult to understand and “would require employers to conduct expensive time and motion studies.” The change from employees who are employed “for the purpose of” making outside sales to employees whose “primary duty” is outside sales is not substantive. The definition of “primary duty” in the final regulations at § 541.700(a) emphasizes that it must be the employee’s “principal, main, major or most important duty,” which is at least as strong as the ambiguous “for the purpose of” language from the old rules. Thus, under both the old and final rules, employees will not be exempt from overtime unless their primary duty is outside sales, and the final rule makes clear that merely assigning some outside sales work to an otherwise non-exempt employee will not make someone an exempt outside salesperson.

7) Question: Will those who lead teams gain overtime protections?

Answer: Yes. Overtime protection is strengthened for those who lead teams. Despite a tremendous amount of misinformation being spread regarding “team leaders,” the fact is the final rule is actually *more* protective of employees’ overtime rights than the old rule. The old rule extends, in § 541.205(c), the administrative exemption to “a wide variety of persons who either carry out major assignments in conducting the operations of the business,” while § 541.205(b) exempts those whose work includes “advising the management, planning, negotiating, representing the company, purchasing, promoting sales, and business research and control.” By contrast, § 541.203(c) of the final rule updates this concept with a more modern example, providing that the administrative exemption applies to a white collar “employee who leads a team of other employees assigned to complete *major* projects for the employer,” and provides the following examples of the kinds of major assignments which could qualify – “purchasing, selling or closing all or part of the business, negotiating a real estate transaction or a collective bargaining agreement, or designing and implementing productivity improvements.”

The new language, as an example of a qualifying administrative function, still must be applied in the context of the administrative exemption’s controlling primary duty test. Thus, an exempt administrative employee’s primary duty must be office or non-manual work, must be directly related to the management or general business operations of the employer or the employer’s customers, and must include the exercise of discretion and independent judgment with respect to matters of significance. Thus, “team leaders” who perform mostly production work and perform only minimal office or non-manual work in their capacity as team leaders, or whose primary duty is not directly related to the management or general business operations of the employer, would not meet the primary duty requirements for the administrative exemption. In addition, to be considered an exempt administrative employee under the final rule, any “team leader” must have a primary duty which includes the exercise of discretion and independent judgment with respect to matters of significance.

8) Question: Will working supervisors maintain their overtime pay?

Answer: Yes. Overtime protection is strengthened for working supervisors. The final regulation makes it more difficult to deny overtime protection to employees based on a job title, as new section 541.2 states that job titles are irrelevant. The final rule ***adds a new requirement*** to the executive exemption – making it ***harder*** for employers to deny overtime protection to working supervisors and low-level managers. Moreover, final § 541.106(c) specifically protects the overtime pay of “relief supervisors” and “working supervisors” such as those who work “on the production line in a manufacturing plant.”

The final rules are at least as protective as the old § 541.103, which denies overtime to any worker in a department or subdivision who “spends more than 50 percent of his time in production or sales work” but also “has broad responsibilities similar to those of the owner or manager of the establishment,” and who “supervises other employees, directs the work of warehouse and delivery men, approves advertising, orders merchandise, handles customer complaints, authorizes payment of bills, or performs other management duties as the day-to-day operations require.” Final section 541.106 is not only consistent with the old regulations, it is also “consistent with current case law which makes clear that the performance of both exempt and nonexempt duties concurrently or simultaneously does not preclude an employee from qualifying for the executive exemption.” 69 Fed. Reg. at 22136-37 (citing numerous cases). ***If the Department adopted another position, workers could lose overtime, not gain it.***

9) Question: Will computer employees maintain their overtime pay?

Answer: Yes. There is no change to current law regarding computer employees. The final rules make no change to statutory law regarding computer employees’ overtime status. In fact, the rules adopt provisions on computer employees as passed most recently by Congress in 1996 under § 13(a)(17) of the Fair Labor Standards Act. The Department specifically rejected, 69 Fed. Reg. at 22159, suggestions to list additional computer job titles or duties as exempt beyond those cited in the primary duties test of the statute itself. The final rule at § 541.705 specifies that the “computer employee exemption[] do[es] not apply to employees training for employment.” The final rules on the administrative exemption mirror old § 541.205(c)(7) and 541.207(c)(7), which classify systems analysts and computer programmers engaged in the planning, scheduling, and coordination of activities necessary to develop systems for processing data to obtain solutions to complex problems as exempt “white-collar” workers. The final rules also mirror existing federal case law.

10) Question: Does the “Discretion and independent judgment” standard remain a major aspect of the new regulations?

Answer: Yes. In fact, the final rules strengthen the “discretion and independent judgment” requirement.

The old § 541.2(e)(2) requires that a worker’s primary duty must be an activity that “includes” the exercise of discretion and independent judgment, in order to be classified under the “short test” for the administrative exemption. However, the final rules are *more protective* of workers’ overtime rights, because they strengthen the “discretion and independent judgment” standard by adding the requirement that the discretion be exercised “with respect to matters of significance.” The old “long test” language requires the “customary and regular” exercise of discretion, but that test applies only to employees earning between \$8,060 and \$13,000 per year – all of whom are now guaranteed overtime under the final rule, regardless of their job duties. Some critics also wrongly contend that the nine examples of learned professional occupations in final § 541.301(e) allow employees to be exempt without meeting the duties test. That claim is patently false for a number of reasons. First, some of the examples expressly note that the jobs do not constitute professions falling within the exemption. Second, the examples of professions – all of which are exempt under current law – expressly note that they “generally meet the duties requirements for the learned professional exemptions,” thus demonstrating that the tests obviously apply. Third, final rule § 541.2 expressly notes that “A job title alone is insufficient to establish the exempt status of an employee. The exempt or nonexempt status of any particular employee must be determined on the basis of whether the employee’s salary and duties meet the requirements of the regulations in this part.”

11) Question: What is meant by a “reasonable relationship?”

Answer: In certain cases, there must be a reasonable relationship between the guaranteed salary and the amount of pay an employee actually receives. Under final rule § 541.604, an employer may provide an exempt employee a guaranteed salary, with the employee’s actual pay amount computed on an hourly, daily or shift basis, but there must be a “reasonable relationship” between the guaranteed amount and what is actually received. This “reasonable relationship” requirement codifies the Wage and Hour Division’s long-standing interpretation of the existing salary basis test (*see* Field Operations Handbook sec. 22b03), which has been upheld in leading federal court decisions. The preamble to the final rule points out how the reasonable relationship standard would protect employees whose pay amount might be computed on an hourly or shift basis; *see* 69 Fed. Reg. at 22184.

12) Question: Is the definition of a non-discretionary bonus for purposes of qualifying for the highly compensated test the same as current law?

Answer: Yes. The definition of a non-discretionary bonus for purposes of the highly compensated test is the same as under current law. No change has been made to the definition of a non-discretionary bonus in section 7(e)(3)(a) of the FLSA and § 778.211, applicable to the computation of an employee’s regular rate of pay. In order to determine whether a bonus qualifies as non-discretionary, an employer would need to analyze whether it retains discretion as to both the fact that a bonus will be paid and the amount of the bonus until at or near the end of the period for which the bonus is paid.

13) Question: Do profits received through a profit sharing program count towards qualification for the highly compensated test?

Answer: Whether profits may count depends on the profit sharing program. Payments received pursuant to certain profit sharing programs do qualify as non-discretionary payments for purposes of satisfying the highly compensated test. Generally, the Department considers such programs which have set terms as to when employees qualify for the payment and which have a definite formula or method for determining the amount of the payment as nondiscretionary. 29 CFR Part 549.

14) Question: May an employer make deductions to an employee’s salary without jeopardizing the employee’s exempt status?

Answer: Deductions from a guaranteed salary are allowed only in limited circumstances. Deductions from pay are permissible: when an exempt employee is absent from work for one or more full days for personal reasons other than sickness or disability, or is absent for one or more full days due to sickness or disability if the deduction is made in accordance with a bona fide plan, policy or practice of providing compensation for salary lost due to illness; to offset amounts employees receive as jury or witness fees, or for military pay; for penalties imposed in good faith for infractions of safety rules of major significance; or for unpaid disciplinary suspensions of one or more full days imposed in good faith for workplace conduct rule infractions. Also, an employer is not required to pay the full salary in the initial or terminal week of employment, or for weeks in which an exempt employee takes unpaid leave under the Family and Medical Leave Act. § 541.602(b).

15) Question: May an employer take deductions from an employee's leave bank for partial day absences?

Yes. Employers may take partial day deductions from an employee's leave bank, even if the deduction results in a negative leave balance; however, an employer may not dock an exempt employee's salary for a partial day absence.

Under the final rules, employers may take deductions from employees' leave accounts for partial day absences, the same as under the old regulations. The preamble specifically states that "employers, without affecting their employees' exempt status, may take deductions from accrued leave accounts..." 69 Fed. Reg. at 22178. The preamble also cites approvingly to a number of Wage and Hour Division opinion letters allowing deductions from accrued leave accounts. Additional opinion letters, dated December 4, 1998, May 27, 1999, and February 16, 2001, similarly provide that employers may reduce the amount of accrued paid leave in an employee's Paid Time Off plan, even if the employee is absent only for a partial day. The employer may reduce the leave so that the employee has a negative leave balance. However, the employee must receive the full guaranteed salary, even if there is no leave in the account or there is a negative balance, if the employee has only a partial day absence.

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